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Interim Co-Lead Counsel for Plaintiffs and the Plaintiff Class

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**PLAINTIFFS' SUPPLEMENTAL
CASE MANAGEMENT CONFERENCE
STATEMENT**

Date: September 12, 2012
Time: 2:00 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

1 Plaintiffs hereby supplement the September 5, 2012 Case Management Conference
2 Statement to apprise the Court of further case developments that occurred after the parties'
3 September 5, 2012 filing (Dkt. No. 179). As indicated, Plaintiffs believed that Defendants'
4 document production was "substantially complete." (*Id.* at 2.) Plaintiffs have since learned that
5 Defendants' document productions omitted material evidence directly relevant to class
6 certification, including evidence of the common impact of Defendants' unlawful agreements on
7 the compensation of their employees; that certain Defendants intend to produce numerous new
8 documents this week; and that a number of documents withheld as privileged may have been
9 withheld without a proper basis.

10 **I. Defendants' Document Production**

11 Defendants have continued to produce documents and data to Plaintiffs on a daily basis,
12 requiring Plaintiffs and their experts to react to new information as it arrives, less than a week
13 before Plaintiffs' September 17, 2012 deadline for class certification. This is inconsistent with
14 the Court's prior orders which contemplate that Defendants would produce relevant information
15 substantially in advance of the due date of Plaintiffs' motion for class certification.

16 In addition, Plaintiffs have become aware that at least some Defendants have failed to
17 produce highly relevant documents. For example, on September 6, 2012, Plaintiffs' counsel
18 wrote counsel for Google regarding Google's failure to produce documents concerning Google's
19 decision to raise the base compensation of all of its employees by 10%, along with other
20 compensation changes, which Google apparently referred to as the "Big Bang" proposal. These
21 documents are directly relevant to Plaintiffs' motion for class certification because the "Big
22 Bang" apparently occurred just after Google entered into a stipulated final judgment with the
23 United States Department of Justice ("DOJ") that prohibited Google from entering into the type
24 of agreements at issue in this case. They are also relevant because they show how competitive
25 recruiting has a common impact on all employees of the company being recruited.

26 Significantly, Plaintiffs did not become aware of these documents through document
27 production or other discovery from Google. Instead, Plaintiffs learned of these documents
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1 because they were apparently provided to, and thus produced by, other Defendants in this case
 2 (namely, Intuit and Intel). Further, Intuit and Intel only produced the documents after Plaintiffs
 3 challenged their privilege logs listing these documents (among others). Many of the documents
 4 were produced from the files of Intuit Chairman Bill Campbell and Intel CEO Paul Otellini. As
 5 Plaintiffs will explain in their forthcoming motion for class certification, these individuals
 6 participated in the development, implementation, and/or enforcement of the express unlawful
 7 agreements at issue in this case. The Google documents produced by Intuit and Intel describe
 8 how the “Big Bang” compensation increase was company-wide and systematic, and arose largely
 9 in response to competitive recruiting by other companies, following the stipulated final judgments
 10 with the DOJ that forbade the agreements in the future. The documents describe Google’s
 11 company-wide counteroffer strategy, including how the way to implement the strategy was to
 12 make systematic compensation changes, rather than individual negotiations with employees who
 13 receive competitive offers. The documents include memoranda to Google’s high-level
 14 “Leadership Development and Compensation Committee.”¹

15 To date, Plaintiffs have still not received these documents from Google², nor have they
 16 appeared on Google’s privilege logs.

17 On September 7, 2012, however, Google belatedly produced approximately one thousand
 18 pages of new documents from Google from the files of two new custodians. (Google had never
 19 informed Plaintiffs that these two custodians had documents responsive to Plaintiffs’ document
 20 requests in response to Plaintiffs’ counsel’s specific requests for the names of all potential
 21 custodians over five months ago, when the parameters of Google’s production was discussed.)
 22 Plaintiffs reviewed these new documents over the weekend of September 7-9, 2012, and
 23 discovered they contained information directly relevant to Plaintiffs’ motion for class
 24 certification. These documents include emails sent shortly after the initiation of the DOJ

25 ¹ The members of Google’s Leadership Development and Compensation Committee are
 26 appointed by Google’s Board of Directors and include at least two “independent” members of the
 Board. See <http://investor.google.com/corporate/board-committees-leadership.html>.

27 ² Plaintiffs have not submitted these Intel and Intuit documents with this Supplemental Statement,
 28 but will provide them to the Court should the Court so request at the Case Management
 Conference.

1 investigation in which Google's recruiting organization identified and pursued thousands of
2 strong candidates who were employees at other Defendants that were previously off-limits. The
3 documents reference spreadsheets that identify the thousands of strong candidates. Despite
4 Plaintiffs' request that they produce the spreadsheets, Google has not done so. None of these new
5 documents appeared on Google's privilege logs.

6 On September 10, 2012, Plaintiffs' counsel met and conferred with Google's counsel to
7 discuss Google's failure to produce responsive documents. Plaintiffs' counsel identified facts
8 suggesting a failure to conduct a reasonably diligent search for responsive documents. Among
9 other things, the Google "Big Bang" documents produced by other Defendants discuss Google's
10 systemic compensation practices thereby making them highly relevant. These documents also
11 include search terms the parties agreed Google would apply, such as "do not call;" search terms
12 Google suggested to Plaintiffs it would apply, such as "compete*" within five words of "talent;"
13 and search terms suggested by Plaintiffs to Defendants, such as "facebook*" within 10 words of
14 "competition." The existence of these terms in these documents means that a computerized
15 search, if done properly, would have identified these documents as potentially responsive months
16 ago. Google's production volume also suggests there may be other documents that have not been
17 produced or logged as privileged. Google's entire Post-DOJ production is less than 3,000
18 documents.³ This is substantially less than any other Defendant, including Defendants that are
19 much smaller than Google (such as Lucasfilm, which produced more than twenty times as many
20 documents). Even Plaintiffs' own production of over 8,000 documents from five individual
21 former employees dwarfs Google's entire Post-DOJ production.

22 Google's counsel informed Plaintiffs yesterday that Google would provide a supplemental
23 document production today (September 11, 2012), and would run additional searches "if
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25 ³ During the meet and confer, Google's counsel stated that Google's production to the DOJ was
26 larger than any Defendant, presumably justifying a smaller production of Post-DOJ documents.
27 However, Google's production to the DOJ of less than 11,000 documents was limited to
28 documents created in 2009 and earlier, and limited to searches that focused on Google's
misconduct, rather than the common *impact* of that misconduct. The purpose of Defendants'
Post-DOJ productions is to augment the DOJ production and fill in these gaps in evidence
collected.

1 Plaintiffs provide Google with additional search terms.” Because it appears the search terms
2 previously discussed were not applied properly, or because documents identified by the search
3 were not produced, Plaintiffs expressed concern with this approach. Google’s counsel also said,
4 for the first time, that Google did not produce Board meeting agendas and other materials, unless
5 the documents “reflected a final decision” on the matter at issue. In addition, Google’s counsel
6 suggested that Google did not produce responsive documents if, in Google’s counsel’s view, the
7 documents were insufficiently “high level.” Plaintiffs asked Google to produce this week all “Big
8 Bang” and other relevant documents, such as those regarding the initiative to recruit previously
9 off-limits candidates or that described relevant topics in Board materials even if not a “final
10 decision,” and to review its prior document selection practices to ensure that it has not withheld
11 additional responsive documents. Google has not committed to doing so.

12 **II. Defendants’ Data Production**

13 Plaintiffs continue to receive additional data from other Defendants relevant to class
14 certification. Yesterday, September 10, 2012, Intuit produced two years’ worth of supplemental
15 compensation data (2010-2012), data that had been previously produced in only yearly
16 “snapshots.” Moreover, contrary to Apple’s representations in the September 5, 2012 Case
17 Management Statement, Apple’s recent data productions are clearly responsive to prior discovery
18 requests. In particular, Apple’s September 5, 2012 production of “sourcing” data includes
19 candidate lead information, current employer, date the candidates were logged into the system,
20 the steps Apple took to contact those candidates, and a detailed “notes” field that includes entries
21 such as “Cold called but learned that he left Oracle in October 09.” This is exactly the type of
22 data Apple agreed to produce months earlier. Unfortunately, Plaintiffs were unaware that Apple
23 possessed, but had failed to produce, this data until Plaintiffs’ 30(b)(6) deposition of an Apple
24 data witness, which Apple initially resisted, on July 12, 2012. At this deposition, Apple’s witness
25 identified the existence of the data but claimed not to have sufficient knowledge to testify about
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28

1 it. Apple has not yet completed production from this database and to date has failed to schedule a
 2 30(b)(6) witness knowledgeable about this data.⁴

3 **III. Defendants' Privilege Logs**

4 On July 16 and 17, 2012, Defendants produced privilege logs to Plaintiffs. Plaintiffs have
 5 challenged certain entries on Defendants' privilege logs and continue to meet and confer
 6 regarding them. Plaintiffs have objected to the withholding of documents not prepared in
 7 anticipation of litigation, documents in which no author or recipient is an attorney or for which
 8 the identity of the author or recipient is unknown, draft corporate policies, documents unrelated to
 9 legal advice, and redactions made on the basis of "responsiveness." Unfortunately, even with the
 10 class certification deadline fast approaching, little progress has been made. Apple has not yet
 11 responded to written objections from Plaintiffs, which Plaintiffs served on August 8. Google
 12 flatly refuses to amend or supplement its logs, making it impossible for Plaintiffs to determine if
 13 many of the documents were properly withheld. Plaintiffs continue to meet and confer with the
 14 other Defendants regarding similar issues, including Intuit's refusal on privilege grounds to
 15 produce communications between Intuit Chairman Bill Campbell and Apple, and Intel's
 16 redactions to a document that is not logged and describes a non-solicit agreement between Intel
 17 and another Defendant. Because of Plaintiffs' recent discovery that Defendants Intel and Intuit
 18 were improperly logging as privileged communications in their possession about Google's "Big
 19 Bang" project, and because of other wholesale inadequacies in privilege log entries across many
 20 Defendants, Plaintiffs anticipate needing Court intervention shortly to make progress in this area.

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 26 ⁴ Despite repeated requests, Apple has not yet provided a knowledgeable 30(b)(6) witness
 27 regarding this data. Plaintiffs 30(b)(6) deposition notice concerning this, and other, forms of data
 28 Apple maintains was served nearly four months ago, on May 23, 2012. The data Apple produced
 last week is responsive to Plaintiffs' document requests and clearly falls within the categories of
 data the parties agreed would be produced months earlier.

1 Dated: September 11, 2012 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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10 *Proposed Interim Co-Lead Counsel for Plaintiff Class*

11 Dated: September 11, 2012 JOSEPH SAVERI LAW FIRM

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18 *Proposed Interim Co-Lead Counsel for Plaintiff Class*

19 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
20 the filing of this document has been obtained from all signatories.